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IN THE
COURT OF APPEALS OF INDIANA

MARLON KIMBROUGH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0606-PC-335
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patricia Gifford, Judge
Cause No. 49G04-9701-PC-013698

March 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Marlon Kimbrough appeals the forty-five year sentence that was imposed after he was re-sentenced on his conviction for Murder,[1] a felony. Specifically, Kimbrough maintains that the mitigating circumstances that were found by the trial court outweighed the single aggravating factor. Thus, Kimbrough argues that the sentence should have been forty-five years executed with ten years suspended. Finding no error, we affirm the judgment of the trial court.

FACTS

The facts as reported in Kimbrough's direct appeal are as follows:

> On January 23, 1997, Antonio Harrison, ("Antonio"), went to a friend's house in the 1100 block of North Elder in Indianapolis. Antonio left the friend's house at approximately 8:00 p.m.; Melvin Harrison, ("Melvin"), left the same house a few minutes later. Melvin saw four or five men, including Marlon Kimbrough and Lamont Rice, standing in the street. Rice walked up to Antonio with a gun in his hand and asked Antonio, "Who pulled a gun out on my cousin." (R. 261). Kimbrough and Rice then started shooting at Antonio, who attempted to take cover behind a parked car. Although Antonio had a gun, he did not fire it.
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> Later that evening, Laura Croom, Rice's girlfriend, went to Rice's apartment. Kimbrough and some other men were also there. Kimbrough asked Rice if he saw what he (Kimbrough) did. Kimbrough further explained that he (Kimbrough) "went up close to him and shot him." (R. 370). Antonio subsequently died. An autopsy revealed that he suffered two gunshot wounds—one to the chest and another to the arm. The shot to the chest was fatal. Kimbrough was convicted by jury of murder and carrying a handgun without a license.

Kimbrough v. State, No. 49A05-9804-CR-190, slip op. at 2-3 (Ind. Ct. App. Jan. 19, 1999).

On March 9, 1998, Kimbrough was sentenced to an aggregate term of forty-five years on both offenses. While we affirmed the convictions and sentence on direct appeal,

[1] Ind. Code § 35-42-1-1.

Kimbrough subsequently filed a petition for post-conviction relief on January 9, 2006, claiming ineffective assistance of both trial and appellate counsel. Following a hearing, the post-conviction court granted Kimbrough's petition. Specifically, the post-conviction court determined that

> 2. The Court finds that Petitioner Kimbrough is entitled to relief on his claims of trial counsel ineffectiveness and appellate counsel ineffectiveness.
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> 3. This case requires the Court to analyze several statutes in effect at the time of Kimbrough's offense and sentencing that established the parameters of a murder sentence for a crime committed on January 23, 1997.
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> Indiana Code section 35-50-2-3(a) provided in relevant part:
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> A person who commits murder shall be imprisoned for a fixed term of fifty-five (55) years, with not more than ten (10) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances.
>
> Ind. Code § 35-50-2-3(a) (Burns 1996 Cum. Supp.).
>
> On the other hand, two other statutes together established what portion of the murder sentence may be suspended. Indiana Code section 35-50-2-2(b) provided: "With respect to the crimes listed in this subsection, the court may suspend only that part of the sentence that is in excess of the minimum sentence." Ind. Code § 35-50-2-2(b). . . . The term "minimum sentence" was defined in Indiana Code section 35-50-2-2(c)(1). That statute provided in relevant part: "As used in this chapter, 'minimum sentence' means . . . for murder, thirty (30) years." Ind. Code § 35-50-2-1(c)(1). . . .
>
> The Indiana Supreme Court described the interaction between these statutes as follows: "[A]s can be readily discerned, Indiana Code section 35-50-2-3(a) establishes the length of murder sentences generally, while Indiana Code section 35-50-2-1 establishes, in conjunction with other statutes, what portion of a sentence may be suspended." Johnson v. State, 702 N.E.2d 711, 712 (Ind. 1998).

4. In determining the application of these statutes the Court must first decide if irreconcilable conflict exists between them. "[T]he court must attempt to harmonize two conflicting statutes before applying any other rule of statutory construction." Board of Trustees of Indiana Pub. Employees' Retirement Fund v. Grannan, 578 N.E.2d 371, 375 (Ind. Ct. App. 1991).

5. Whether there is conflict between these statutes is a matter of first impression. The Indiana Supreme Court left this issue for another day in Johnson. "We need not decide whether any conflict exists [between these statutes] . . . because Appellant received neither a mitigated sentence nor a suspended sentence." Johnson, 702 N.E.2d at 712 n.2.

6. The Court finds that conflict does not exist between the statutes. Several considerations compel this result.

   First, the Court finds that the term "minimum sentence" is a term of art that appears only in the suspension statutes. See, e.g., I.C. § 35-50-2-1(c); I.C. §35-50-2-2(b). In these statutes, the term "minimum sentence" operates to limit the amount of a given sentence that the trial court may suspend. For murder, the sentence may not be suspended below thirty (30) years. I.C. §35-50-2-1(c)(1); I.C. §35-50-2-2(b)(4)(A). Notably, the term "minimum sentence" does not appear in Indiana Code section 35-50-2-3, which is the statute defining the general range of murder sentences. As a result, the term "minimum sentence" has meaning only in the context of how much of a sentence may be suspended.

   Second, the Court finds that both Indiana Code section 35-50-2-1(c)(1) and Indiana Code section 35-50-2-3(a) would be given effect if Kimbrough's sentence is suspended below forty-five (45) years, so long as the sentence is not suspended below thirty (30) years. A sentence of forty-five (45) years with ten (10) years suspended complies with both statutes. The sentence complies with Indiana Code section 35-50-2-1(c)(1), which established that a murder sentence may not be suspended below thirty (30) years. The sentence also complies with Indiana Code section 35-50-2-3(a), which established a sentencing range for murder of forty-five (45) to sixty-five (65) years. The sentence is within the prescribed range because even where a "sentence" is suspended, that "sentence" still has been imposed." A suspended sentence is one actually imposed but the execution of which is thereafter suspended. Such a sentence is 'a definite sentence postponed so that the defendant is not required to serve his time in prison unless he commits another crime or violates some court-imposed condition." Beck v. State, 790 N.E.2d 520, 523 (Ind. Ct. App. 2003). . . . "To be sure, a [fully]

> suspended maximum sentence is less onerous in its penal impact upon a defendant than a fully executed sentence, but it is not a sentence for less than the maximum number of years called for by statute. Cox v.State, 792 N.E.2d 878, 884-85 (Ind. Ct. App. 2003). . . . A suspended sentence in criminal law means in effect that the defendant is not required at the time sentence is imposed to serve the sentence." Shaffer v. State, 755 N.E.2d 1193, 1196 (Ind. Ct. App. 2001).
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> 7. The Court finds that a sentence of forty-five (45) years with ten (10) years suspended gives effect to both statutes. "If at all possible, the court must adopt a construction that gives effect to both statutes." Simmons, 773 N.E.2d at 826. Accordingly the Court has authority to impose a sentence for Kimbrough of forty-five (45) years with ten (10) years suspended.
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> . . .
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> 9. The Court finds that trial counsel rendered deficient performance by failing to inform the sentencing court that the sentence for murder could be suspended below forty-five (45) years. Trial counsel's mistake occurred because he was not aware of the applicable sentencing statutes.
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> 10. The Court also finds that trial counsel's deficient performance prejudiced Kimbrough. At the sentencing hearing, the sentencing court was also unaware that sentencing statutes established that Kimbrough's sentence could be suspended below forty-five (45) years. However, had the sentencing court been made aware that the sentencing statutes established that a sentence for murder could be suspended below forty-five (45) years, the sentencing court would have imposed a sentence of forty-five (45) years with ten (10) years suspended.

Appellant's App. p. 159-63. The post-conviction court also found Kimbrough's appellate counsel ineffective because the sentencing "issue was obvious on the face of the record." Id.[2]

Thereafter, Kimbrough was re-sentenced on May 26, 2006. At that sentencing hearing, the trial court took judicial notice of Kimbrough's post-conviction hearing, and

[2] We are not absolutely convinced that a conflict did not exist between the statutes when Kimbrough was sentenced. However, even if the post-conviction court may have misconstrued the applicability of the statutes, the result reached in this case is not affected in light of our discussion below.

considered an affidavit that was submitted by Mark Renner, the magistrate who presided over the trial and the original sentencing hearing. Magistrate Renner averred that:

> Had I been made aware of my authority to sentence Mr. Kimbrough to less than forty-five years executed, I would have exercised that authority. I am confident that I would have imposed a sentence of forty-five years, with ten years suspended, for an executed sentence of thirty-five years. My sentencing decision would have been based upon Mr. Kimbrough's young age and the fact that the present offense was his first adult conviction.

Def. Ex. 6. Notwithstanding the above, the trial court re-sentenced Kimbrough to an executed term of forty-five years. In particular, the trial court observed:

> Show the Court having reviewed the record and the affidavits and the pre-sentence report and I would conclude with the original sentencing judge that the age of the defendant at the time of the crime in fact would be a mitigating circumstance. I, however, disagree that the fact that he had a lack of criminal history being a mitigating circumstance. Since he was 17 it's a little hard to get one at that time. I would concur with the sentencing judge that it was an aggravating circumstance concerning his juvenile criminal history. Having reviewed all of this I am of the opinion that even though the statute had a quirk in it that would have allowed the sentence to be mitigated further that mitigation did [not] in fact override the aggravating circumstance and the sentence of the defendant to the minimum sentence as to the statutory amount of 45 years would be appropriate and due to the circumstances of the charges against the defendant I don't believe it would be appropriate to suspend any of that within allowed—range allowed by the statute so the sentence of 45 years will stand.

Tr. p. 12-13. Kimbrough now appeals.

DISCUSSION AND DECISION

In resolving Kimbrough's challenge to his sentence, we initially observe that sentencing decisions are within the trial court's discretion. Hayden v. State, 830 N.E.2d 923, 928 (Ind. Ct. App. 2005). Additionally, when a trial court engages in the process of balancing the aggravating and mitigating circumstances, it is obligated to include a statement

of reasons for selecting the sentence imposed. Jones v. State, 698 N.E.2d 289, 291 (Ind. 1998). Although the trial court is not required to find mitigating circumstances that are offered by a defendant or to explain why it has chosen not to make such a finding, the failure to identify mitigating circumstances that are clearly supported by the record may reasonably give rise to a belief that they were overlooked and not properly considered. Id.

When Kimbrough was originally sentenced, Indiana Code section 35-50-2-3 provided that "a person who commits murder shall be imprisoned for a fixed term of fifty-five (55) years, with not more than ten (10) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances; in addition, the person may be fined not more than ten thousand dollars ($10,000).[3] At that time, this court was authorized to review and revise a sentence authorized by statute if we found that the sentence was "manifestly unreasonable in light of the nature of the offense and the character of the offender." Ind.Appellate Rule 7(B).[4] To warrant modification of a sentence as manifestly unreasonable, we had to find that it was clearly, plainly, and obviously unreasonable. Thacker v. State, 709 N.E.2d 3, 10 (Ind. 1999)

In this case, the trial court that re-sentenced Kimbrough engaged in a balancing of aggravating and mitigating factors. Tr. p. 12-13. In particular, the trial court identified

[3] Indiana's sentencing scheme was amended effective April 25, 2005, to incorporate advisory sentences rather than presumptive sentences and comply with the holdings in Blakely v. Washington, 542 U.S. 296 (2004), and Smylie v. State, 823 N.E.2d 679 (Ind. 2005). See Ind. Code §§ 35-38-1-7.1, 35-50-2-1.3. As Kimbrough committed the offenses and was originally sentenced before this statute took effect, we apply the former version of the statute. See Prickett v. State, 856 N.E.2d 1203, 1207 n.3 (Ind. 2006).

[4] We presently have the constitutional authority to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is "inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B).

Kimbrough's youth as a mitigating circumstance. Id. at 12. However, the trial court disagreed with the magistrate who sentenced Kimbrough originally, specifically that the absence of an adult criminal history was a mitigating factor. Id. The trial court further concurred with the prior sentencing magistrate that Kimbrough's juvenile history was an aggravating factor. Id.

While Kimbrough argues that the trial court improperly ignored the affidavit of the magistrate, the trial court indicated that it had reviewed that document. Id. And the discussion of the balancing process with regard to the mitigating and aggravating circumstances indicated a clear awareness of the prior sentencing magistrate's actions and opinions. Id. In essence, a trial court on re-sentencing is bound merely by Post-Conviction Rule 1, section 10, which provides that:

> (a) If prosecution is initiated against a petitioner who has successfully sought relief under this rule and a conviction is subsequently obtained, or
>
> (b) If a sentence has been set aside pursuant to this rule and the successful petitioner is to be resentenced, then the sentencing court shall not impose a more severe penalty than that originally imposed unless the court includes in the record of the sentencing hearing a statement of the court's reasons for selecting the sentence that it imposes which includes reliance upon identifiable conduct on the part of the petitioner that occurred after the imposition of the original sentence, and the court shall give credit for time served.

P-C.R. (1)(10). Here, the re-sentencing court determined that no part of the original sentence should have been suspended in light of the crimes that Kimbrough committed. Tr. p. 12-13. Indeed, the trial court considered the magistrate's opinion and dismissed it as insubstantial in light of the circumstances that gave rise to Kimbrough's charges. Moreover, because an

additional aggravator changed the balance of the sentence, it would have been illogical for the trial court to grant Kimbrough's request for less executed time. Therefore, we cannot say that the trial court abused its discretion in declining to give the prior sentencing magistrate's opinion such weight as would lead to a reduced executed sentence. Thus, we conclude that the re-sentencing court did not err in sentencing Kimbrough to an executed term of forty-five years.

The judgment of the trial court is affirmed.

DARDEN, J., and ROBB, J., concur.